



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable Coke Stevenson
Governor of Texas
Austin, Texas

Dear Governor Stevenson:

Opinion No. O-4542
Re: Property officer to supervise
Civilian Defense property.

Your request for opinion has been received and carefully considered by this department. We quote from your request as follows:

"On April 15, 1942, I requested an opinion on the following question:

"Can the Governor name an official of the State Government as State Property Officer with the duties set out as stated and would it be legal for him to make the bond required of such an officer?"

"This request was made in the light of Regulations No. 1 of the United States Office of Civilian Defense entitled, 'Concerning Loans of Equipment and Supplies to Civil Authorities.'

"In view of the fact that the United States Office of Civilian Defense has now issued supplementary rules in this regard which affect the question, I respectfully withdraw my request of April 13, 1942, for a decision on the point stated, and now request your opinion on the following questions:

"(1) Can the Governor appoint a private individual as State Property Officer?

"(2) Can the Governor appoint the Adju-



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tant-General as State Property Officer for the purposes mentioned?

"(3) Can the Governor appoint an employee on the staff of the Adjutant-General as State Property Officer?

"(4) Can the Governor's Office pay the bond premium required for the State Property Officer?

"(5) Can the Adjutant-General's Office pay the bond premium required for the State Property Officer?

"(6) Can the Governor accept the offer of the Regional Office of Civilian Defense to have a member of the Office of Civilian Defense Staff perform the designated functions of a State Property Officer? (Reference is made to a letter to the Governor, under date of June 22, 1942, from Milton T. Gregory, Assistant Regional Director, Eighth Civilian Defense Region, copy of which is attached)."

The Director of the Office of Civilian Defense, pursuant to authority vested in him by Executive Order No. 8757 dated May 20, 1941, and pursuant to Section 1 of the act approved January 27, 1942, and in accordance with Article 13 of Executive Order No. 9088 dated March 6, 1942, authorizing the Director of Civilian Defense to make and issue such rules, regulations and orders as he may deem necessary or desirable to carry out the purposes of the aforementioned act of January 27, 1942 (relating to the providing of protection of persons and property from bombing attacks, sabotage or other war hazards), has made and issued regulations concerning the distribution and supervision of Civilian Defense equipment allotted by the Federal Government to State municipalities and authorities. Regulation No. 1 of said Director reads in part as follows:

"1. GENERAL PROGRAM

"(a) The Director of Civilian Defense will from time to time make available to localities

of the United States, its territories and possessions, equipment and supplies for the protection of persons and property from bombing attacks, sabotage, and other war hazards.

"(b) Such equipment and supplies will be made available by loans to communities within the States which communities may in turn distribute, under the direction of the Local Defense Council, the equipment and supplies to responsible and qualified individuals or organizations, all in accordance with regulations issued by the Director of Civilian Defense.

"(c) Each borrowing community will designate a Local Property Officer who will act as custodian of the property and will be responsible therefor to the Office of Civilian Defense. State Property Officers are to be appointed to maintain records with respect to all property loaned in their respective States or areas, and property may, in certain instances, be delivered to the communities through such State Property Officers. State Property Officers and Local Property Officers will deal with and distribute the property only in the manner prescribed by the Director of Civilian Defense.

"(d) Regional Directors of the Office of Civilian Defense are to supervise the activities of State Property Officers and Local Property Officers.

"(e) The equipment and supplies shall at all times be at the disposition of the United States Government, and the United States Government shall retain its full rights as owner, lessee or borrower, as the case may be, of such property. To such extent as may be practicable, all such supplies and equipment shall at all times be clearly and distinctly marked as the property of, or under the control of, the United States Government, Office of Civilian Defense.

"(f) These regulations governing such loans are part of the agreement of each community receiving such a loan, and in addition should serve as a guide to State and Local Property Officers in the performance of their duties.

"2. DEFINITIONS.

"(a) Civil Authority means any State or community, as hereinafter defined, or any duly elected or appointed official, agent, board, commission, or other body of persons duly authorized to act on behalf of any State or community.

"(b) State means any State or territory or possession of the United States, and, in addition, means any area designated by the Director of Civilian Defense as a special area for purposes of these regulations.

"(c) Community means any municipality, town or village, or any other political subdivision of any State, or any area designated by the Director of Civilian Defense as a community for purposes of these regulations.

"(d) Chief Executive Officer means the Mayor of a community or other person or body exercising paramount local executive power.

"(e) Local Defense Council means the body duly appointed by the duly authorized appointive authority to be responsible for civilian defense in the community.

"(f) Director of Civilian Defense means the Director of the Office of Civilian Defense appointed by the President of the United States.

"(g) Federal Law means the 'Act to provide protection of persons and property from bombing attacks in the United States, and for other purposes' approved January 27, 1942, and Acts supplemental thereto relating to the Office of Civilian Defense, and Executive Orders issued

pursuant to such Acts or relating to the Office of Civilian Defense.

"(h) Property means equipment and supplies belonging to, or under the control of, the Office of Civilian Defense.

"(i) Accountability devolves upon any person who is required to maintain records and a property account with respect to property, whether or not in the custody of such person, and is discharged by the maintenance of proper records and accounts and by the production of proper receipts for all property received by such person but no longer in his custody.

"(j) Responsibility devolves upon any person who has custody of property or the duty to supervise others having such custody, and is discharged by the exercise of good faith and due care in the performance of all specified duties.

"3. CERTIFICATE AND AGREEMENT OF CIVIL AUTHORITY OF RECEIVING COMMUNITY.

"Each community to which a loan of property is to be made by the Director of Civilian Defense, shall, prior to the making of such loan, furnish to the Office of Civilian Defense a Certificate and Agreement, on CCD Form No. 501 duly executed by its Chief Executive Officer, as the civil authority of the community duly authorized to act in such respect, which Certificate and Agreement shall include, among other things, a certification that the community is in need of, but unable to provide, the property therein specified, an agreement on behalf of the community as to the maintenance, use, distribution and return of the property, and a certification as to the appointment, by the duly authorized appointive authority, of a designated Local Property Officer as the agent of the community authorized to receive the property on behalf of the community and to perform the duties prescribed with respect thereto by the Director of Civilian Defense.

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Each Local Property Officer shall agree, on OCD Form No. 501, to comply with all rules, regulations, orders, and instructions of the Director of Civilian Defense. Such Certificates and Agreements shall be executed in duplicate, one copy to be filed with the Office of Civilian Defense, Washington, D. C., and one copy with the Regional Director.

" . . .

"5. APPOINTMENT AND TENURE OF STATE AND LOCAL PROPERTY OFFICERS.

"(a) As a condition precedent to the making of any loan to a community in any State, the Governor of such State shall duly appoint a State Property Officer. In the event that an area is designated as a special area by the Director of Civilian Defense, a State Property Officer thereof shall, as a condition precedent to a loan to any community therein, be duly appointed by the Governor of the State in which the largest city in such area is located, and in such case the State Property Officer for the State or States in which such special area is located shall have no duties or accountability with respect to the said special area. The duties and obligations of each State Property Officer shall be as set forth in these regulations or as otherwise prescribed by the Director of Civilian Defense. Each State Property Officer shall hold office during the pleasure of the appointing Governor. Appointments of State Property Officers shall be on OCD Form No. 500, executed in duplicate, one copy to be filed with the Office of Civilian Defense, Washington, D. C., and one copy with the Regional Director; each State Property Officer shall agree thereon to comply with all rules, regulations, orders, and instructions of the Director of Civilian Defense.

"(b) As a condition precedent to the making of any loan to a community, the duly authorized appointive authority of such com-

munity shall duly appoint a Local Property Officer to serve as the duly authorized agent of the community to receive such loan upon such terms and conditions as shall be prescribed by the Director of Civilian Defense. The duties and obligations of each Local Property Officer shall be as set forth in these regulations or as otherwise prescribed by the Director of Civilian Defense. Each Local Property Officer shall hold office during the pleasure of the local appointive authority.

"6. BONDING OF PROPERTY OFFICERS.

"(a) The Office of Civilian Defense, Washington, D. C., requires State Property Officers to be bonded in the amount of \$10,000 to the Federal Government, and the obligation for the premium thereon shall be assumed by the State Property Officer or by the State designating any such State Property Officer.

"(b) The Office of Civilian Defense, Washington, D. C., requires Local Property Officers to be bonded to the Federal Government, in the amount of \$10,000 in communities whose population is 200,000 or more, and \$5,000 in other communities, and the obligation for the premium thereon shall be assumed by the Local Property Officer or by the community for which the Local Property Officer has been designated.

"(c) Each such bond shall be executed on CCD Form No. 502 and by such corporate surety as shall be acceptable to the Director of Civilian Defense.

"(d) Bonds of State and Local Property Officers shall be executed in triplicate, two copies to be filed with the Office of Civilian Defense, Washington, D. C., and one copy to be filed with the Regional Director.

"7. DISTRIBUTION OF CIVILIAN DEFENSE PROPERTY.

"Each Local Property Officer shall distribute the property received by him, as the authorized agent of his community, to responsible and qualified individuals or organizations in his community or in the territory adjacent thereto, in such amounts and in such manner as the Local Defense Council shall deem advisable in order to comply with the requirements of Federal Law, including the requirement that such property shall be distributed for the adequate protection of persons and property from bombing attacks, sabotage, or other war hazards: Provided, however, That such distribution shall at all times be subject to and in accordance with such rules, regulations, orders, and instructions as the Director of Civilian Defense may make with respect thereto. Each Local Property Officer shall obtain from each individual or organization to whom any property is distributed, whether for further distribution or for their own use, as well as from any transferee of such property, a duly executed OCD Form No. 519, which shall constitute a receipt for the property and an agreement with respect to the protection, maintenance, use, and return thereof in accordance with all rules, regulations, orders, and instructions of the Director of Civilian Defense.

"8. DUTIES OF STATE PROPERTY OFFICERS.

"The duties of each State Property Officer are to:

"(a) Receive all property shipped to him by the Office of Civilian Defense for communities within his State or area, and cause such property to be delivered forthwith and without delay to the Local Property Officers of the respective communities, in such amounts and manner as shall be specified in any order or instruction issued by the Office of Civilian Defense, Washington, D. C.

"(b) Maintain an adequate record of all property delivered to him and all property delivered to Local Property Officers within his State or area, and preserve all receipts for such property.

"(c) Prepare and submit to the Office of Civilian Defense, Washington, D. C., and to his Regional Director, reports and information in such form and manner as required by them, respectively, as to the location, custody, condition, and status of all property in his State or area.

"(d) Supervise the examination and checking of all property shipped to or by him.

"(e) Supervise the storage and handling of all property in his custody, and make arrangements so that such property may be inspected at any time by the representatives of the Office of Civilian Defense.

"(f) Make arrangements, satisfactory to the Office of Civilian Defense, Washington, D. C., adequately to store, handle, maintain, protect, deliver, and return all property in his custody, and provide suitable facilities, at the expense of his State, for the proper storage, handling, protection, delivery, and return of all such property: Provided, however, That he is not required to obtain fire, burglary, or other insurance with respect to any property.

"(g) Make arrangements, satisfactory to the Office of Civilian Defense, Washington, D. C., for the prompt return of any property received by him (unless lost, destroyed, or consumed in the course of its use in accordance herewith and proper Report of Adjustment with respect thereto has been filed with and approved by the Office of Civilian Defense) and in his custody if and when recalled for any reason whatsoever by the Office of Civilian Defense, Washington, D. C., and cause such property forth-

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with and without delay to be expeditiously transported and delivered to or upon the order of the Office of Civilian Defense, Washington, D. C.; Provided, however, That any reasonable expense incident to the return of such property will be borne by the Office of Civilian Defense upon the presentation of duly verified vouchers.

"(h) Be accountable to the Office of Civilian Defense for all property within his State or area.

"(i) Be responsible to the Office of Civilian Defense for the performance of his duties, including the storing, handling, maintaining, protecting, delivering, and returning of all property received by him or his agents until such property shall have been delivered by him to and received by Local Property Officers in accordance with rules, regulations, orders, and instructions of the Director of Civilian Defense.

"(j) Perform such other duties as may be necessary in administering his office, or as shall be prescribed by the Director of Civilian Defense.

"State Property Officers may appoint agents to assist in the performance of their duties, but shall be responsible for the acts or omissions of such agents.

" . . . "

Executive Order No. 9088 reads in part as follows:

"No. 9088

"PREScribing REGULATIONS CONCERNING CIVILIAN DEFENSE

"By virtue of the authority vested in me by the act entitled 'An Act to provide protection of persons and property from bombing attacks in the United States, and for other purposes', approved January 27, 1942, and as

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President of the United States and Commander in Chief of the Army and Navy, I hereby prescribe the following regulations concerning civilian defense:

"1. Such funds as may be available to enable the Director of Civilian Defense to carry out the provisions of the aforementioned act of January 27, 1942, shall be used only for acquiring facilities, equipment and supplies necessary to provide for the adequate protection of persons and property from bombing attacks, sabotage and other war hazards in the United States, its territories and possessions; for providing services necessary to facilitate effective use of all such facilities, equipment and supplies; for defraying expenses of procurement (including research and development), inspection, transportation, storage, maintenance, protection, distribution, recovery and return of facilities, equipment and supplies; and for accounting and administration with respect to such facilities, equipment and supplies, services and expenses.

"2. The Director of Civilian Defense from time to time within the limitations of such funds as may be available to the Office of Civilian Defense shall determine the general types and respective quantities of equipment which he shall deem necessary and desirable to be purchased. In making such determinations, the Director shall be afforded the advice and assistance of the War Department and may make use of any other technical assistance, studies, reports or information which may be available to him.

"3. The Director of Civilian Defense shall notify the Secretary of War, or such chiefs of services, bureaus or divisions of the War Department as the Secretary may direct, of each determination by the Director of the necessity of and desirability for the purchase of equipment in accordance with paragraph 2 of this order. The War Department shall thereupon undertake all steps

necessary for the procurement as promptly as possible of equipment of the type and in the quantity specified by the Director of Civil Defense.

"4. In connection with the procurement of items of equipment for the Office of Civilian Defense the War Department shall undertake all necessary research, development and standardization of such equipment; shall contract for the purchase of such equipment; shall conduct all necessary inspections during and upon completion of manufacture or assembly; and shall see that all equipment conforms to specifications prior to acceptance.

"5. The War Department shall keep the Director of Civilian Defense informed of specific items of equipment being procured and of the approximate or probable dates for delivery thereof, and the Director of Civilian Defense shall furnish to the War Department timely instructions as to the place or places at which such equipment shall be delivered to the Office of Civilian Defense or upon its order. The War Department shall make all necessary and appropriate arrangements for the shipment of such equipment to the place or places so designated and shall be responsible for such equipment until delivery at such place or places. Thereafter the Office of Civilian Defense shall be responsible for such equipment, including its storage, maintenance, protection, issue and distribution.

"6. There shall be made available to the War Department, from time to time, within the limitations of such funds as may be available to the Office of Civilian Defense, sufficient funds to cover all proper expenses incurred by the War Department in pursuance of this order, including costs of research, development, procurement, inspection, transportation, and furnishing of facilities and services. The War Department shall have au-

thority to pay all such expenses out of the funds so made available to it. The War Department shall keep the Office of Civilian Defense informed from time to time of all expenditures made from, and obligations incurred against, the funds so made available to it.

"7. In addition to facilities, equipment and supplies provided for the Office of Civilian Defense through the War Department as heretofore authorized, the Director of Civilian Defense may accept equipment or supplies transferred from any other department or agency of the Federal Government in conformity with applicable law, and may accept donations of, or may borrow or lease facilities, equipment or supplies from, states, municipalities or other political subdivisions, or from private individuals or corporations. The Office of Civilian Defense shall maintain at all times full and accurate records of all property received by it and of the disposition thereof. The Director of Civilian Defense shall make adequate arrangements for the storage, maintenance and protection of all equipment, facilities and supplies of the Office of Civilian Defense in its possession.

"8. Within the limitations of such funds as may be available to the Office of Civilian Defense, the Director may arrange with other public or private agencies for such research or development work, in addition to that of the War Department in connection with the procurement of equipment, as he may deem advisable in order better to provide for the adequate protection of persons and property from bombing attacks, sabotage or other war hazards.

"9. The Director of Civilian Defense shall make available the facilities, supplies, and services of the Office of Civilian Defense in such localities in the United States, its territories and possessions as he shall determine to be in need of, but unable to provide,

adequate protection of persons and property from bombing attacks, sabotage or other war hazards. . . .

" . . .

"11. The equipment, facilities and supplies of, or under the control of, the Office of Civilian Defense shall be made available in any locality only by loan to duly constituted civil authorities of any state, territory, municipality or other political subdivision comprising or situated within such locality, and any such authority may distribute the same to responsible and qualified individuals or organizations, in accordance with regulations issued by the Director of Civilian Defense; provided that it shall be a condition of all such loans that the civil authority to which each loan is made shall give assurance to the Director that the property loaned shall be adequately protected and maintained, that it shall not be used otherwise than for the protection of persons or property from bombing attacks, sabotage or other war hazards or for training or instruction incidental to such use, and that such property unless lost, destroyed or consumed in the course of such use shall be returned to the United States Government at any time upon order of, or pursuant to rules or regulations prescribed by, the Director of Civilian Defense.

" . . .

"Franklin D. Roosevelt

"The White House,
March 6, 1942."

Executive Order No. 8757 reads in part as follows:

"No. 8757 :

"ESTABLISHING THE OFFICE OF CIVILIAN DEFENSE
IN THE OFFICE FOR EMERGENCY MANAGEMENT OF THE
EXECUTIVE OFFICE OF THE PRESIDENT

"By virtue of the authority vested in me
by the Constitution and statutes, and in order

to define further the functions and duties of the Office for Emergency Management of the Executive Office of the President in respect to the national emergency as declared by the President on September 8, 1939, to assure effective coordination of Federal relations with State and local governments engaged in defense activities, to provide for necessary cooperation with State and local governments in respect to measures for adequate protection of the civilian population in emergency periods, to facilitate constructive civilian participation in the defense program, and to sustain national morale, it is hereby ordered as follows:

"1. There is established within the Office for Emergency Management of the Executive Office of the President the Office of Civilian Defense, at the head of which shall be a Director appointed by the President. The Director shall discharge and perform his responsibilities and duties under the direction and supervision of the President. The Director shall receive no salary or other remuneration for his services, but shall be entitled to actual and necessary transportation, subsistence, and other expenses incidental to the performance of his duties.

"2. Subject to such policies, directions, and regulations as the President may from time to time prescribe, and with such advice and assistance as may be necessary from the other departments and agencies of the Federal Government, and utilizing the operating services and facilities of such departments and agencies as far as possible, the Director shall perform and discharge the following described duties and responsibilities:

"a. Serve as the center for the coordination of Federal civilian defense activities which involve relationships between the Federal Government and State and local governments, territories, insular possessions, and the District of Columbia (as hereinafter used in this Order the term 'State and local' shall include territories, insular possessions, and the District of Columbia); establish and maintain

contact with State and local governments and their defense agencies; and facilitate relationships between such units of government and the agencies of the Federal Government in respect to defense problems.

"b. Keep informed of problems which arise from the impact of the industrial and military defense effort upon local communities, and take necessary steps to secure the cooperation of appropriate Federal departments and agencies in dealing with such problems and in meeting the emergency needs of such communities.

"c. Assist State and local governments in the establishment of State and local defense councils or other agencies designed to coordinate civilian defense activities.

"d. With the assistance of the Board for Civilian Protection, described in paragraph 4 of this Order, study and plan measures designed to afford adequate protection of life and property in the event of emergency; and sponsor and carry out such civil defense programs, including the recruitment and training of civilian auxiliaries, and disseminate to appropriate officials of the Federal Government and State and local governments such information concerning civil defense measures as may be necessary to meet emergency needs.

"e. With the assistance of the Volunteer Participation Committee, described in paragraph 5 of this Order, consider proposals, suggest plans, and promote activities designed to sustain the national morale and to provide opportunities for constructive civilian participation in the defense program; review and approve all civilian defense programs of Federal departments and agencies involving the use of volunteer services in order to assure unity and balance in the application of such programs; and assist State and local defense councils or other agencies in the organization of volunteer service units and in the development of their activities.

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"f. Maintain a clearing house of information on State and local defense activities in cooperation with appropriate Federal departments and agencies.

"g. Review existing or proposed measures relating to or affecting State and local defense activities, and recommend such additional measures as may be necessary or desirable to assure adequate civilian defense.

"h. Perform such other duties relating to participation in the defense program by State and local agencies as the President may from time to time prescribe.

" . . .

"6. The Director is authorized, with the approval of the President, to appoint such additional advisory committees and subcommittees, with respect to State and local cooperation, national morale, civil defense planning, civilian participation, and related defense activities, as he may find necessary or desirable to assist him in the performance of his duties. Such advisory committees may include representatives from Federal departments and agencies, State and local governments, private organizations, and the public at large. The members of advisory committees shall serve as such without compensation, but shall be entitled to actual and necessary transportation, subsistence, and other expenses incidental to the performance of their duties.

" . . .

"Franklin D. Roosevelt

"The White House
May 20, 1941"

We have received the further information from your office that the State Property Officer will receive no compensation for the duties he performs.

Section 12 of Article 16 of our State Constitution provides:

"No member of Congress, nor person holding or exercising any office of profit or trust, under the United States, or either of them, or under any foreign power, shall be eligible as a member of the Legislature, or hold or exercise any office of profit or trust under this State."

Section 33 of Article 16 of our State Constitution provides:

"The Accounting Officers of this State shall neither draw nor pay a warrant upon the Treasury in favor of any person, for salary or compensation as agent, officer or appointee, who holds at the same time any other office or position of honor, trust, or profit, under this State or the United States, except as prescribed in this Constitution. . . ."

The Legislature of Texas has not authorized the expenditure of any state funds for the aid of the Office of Civilian Defense in the matter inquired about. Nor has the Legislature of Texas made any appropriation to take care of such matters. Besides no appropriation would be valid unless there was a pre-existing law authorizing same. See Section 44, Article 3, Texas Constitution, and the case of *Austin National Bank v. Sheppard*, 123 Tex. 272, 75 S. W. (2d) 212.

We have carefully examined the appropriation bill for the current biennium and have been unable to find any appropriation from which the Governor or Adjutant General could pay the bond premiums for the State Property Officer mentioned in your letter, or for any other expense connected with the Office of Civilian Defense.

In answer to your first question, it is our opinion that the Governor can appoint a private individual as State Property Officer for the Office of Civilian Defense. The Governor does not derive this power from the Legislature of Texas as Governor of Texas, but derives same from the Federal Government.

In answer to your second question it is our opinion that the Adjutant General of Texas cannot hold the office of State Property Officer for the Office of Civilian Defense because Section 12 of Article 16 of our State Con-

stitution prohibits a State officer from holding an office of trust or profit under the United States. It is our opinion that the office of State Property Officer for the Office of Civilian Defense is an office of trust created under the laws of the United States and is a Federal office and not a State office. It could not be a State office because it was not created by the Constitution or statutes of the State of Texas.

In answer to your third question, it is our opinion that an employee in the Adjutant General's office (not being a State officer) could be appointed and hold the office of State Property Officer for the Office of Civilian Defense, but if he did so he would not be entitled to receive any pay from the State of Texas for his services as a State employee. See Section 33 of Article 16, Texas Constitution.

It is our opinion that your fourth and fifth questions should be answered in the negative, and are so answered.

In answer to your sixth question it is our opinion that the Governor could appoint a member of the Office of Civilian Defense staff as State Property Officer for the Office of Civilian Defense.

We wish to point out, however, that you would not be authorized to sign the agreement requested of you enclosed in your letter because:

1. You have not been authorized by the Legislature of Texas to execute such agreement on behalf of the State of Texas and therefore you cannot truly certify as required by said agreement: "... That I am Governor of _____, hereafter referred to as the 'State,' and as such I am duly authorized on its behalf to execute this agreement."

2. The agreement binds the State for various expenses for storage, protection, etc. of equipment. There is no pre-existing State law authorizing such expense nor any State appropriation for same or for any other purpose connected with the matter inquired about.

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We are returning herewith the papers you sent us
with reference to the matter.

Very truly yours

ATTORNEY GENERAL OF TEXAS

By

Wm. J. Fanning

Wm. J. Fanning
Assistant

SJY:GO

ENCLOSURE

APPROVED JUL 14, 1942

George B. Mason
ATTORNEY GENERAL OF TEXAS

